SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 473

GUY M. TURNER AND FRANK B. TURNER, DOING BUSINESS AS TURNER'S TRANSFER,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

Appellees.

STATEMENT OF JURISDICTION

In this suit it was sought to set aside a final order of the Interstate Commerce Commission, and a statutory three-judge court heard the cause and entered a final decree sustaining the order of the Commission.

Jurisdiction in the trial court, and in this court on appeal is given by U. S. Code, Title 28, Sections 43, 45, 46, 47, 47a, 48, and 345.

The date of the decree sought to be reviewed is July 31, 1944. The date of filing this petition for appeal is August 10, 1944.

The proceedings before the Commission sought rights in appellants as a common carrier by motor vehicle over irregular routes under these statutes: *Section 203 (14)*

Interstate Commerce Act, Part 2; Title 49, U. S. Code, Section 303 (14), which defines applicant's business as follows:

> "The term 'common carrier by motor vehicle' means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes * * *."

This language was inserted in 1940 to clarify the less clear language of the original Act. This paragraph originally read:

> "The term 'common carrier by motor vehicle' means any person who or which undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations of carriers by rail or water, and of express or forwarding companies, except to the extent that these operations are subject to the provisions of Part I." (Paragraph (14) Sec. 223.)

The amendment of September, 1940, Chapter 722, 54 Stat. 923, added the "holding out" provision above. In the same section, paragraph 5 of the statute defines "certificate" as:

> "* * * a certificate of public convenience and necessity issued under this part to common carriers by motor vehicle."

Section 206 of the Act (306 of the Code), paragraph a, prohibits operations of motor vehicles generally in interstate commerce,

> "* * * unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations; * * *."

However, in situations like that of appellants, it is, in the same section and paragraph, provided that:

> "* * * if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, * * * and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate."

The only place in the Act where "continuous" is used is in Section 203 of the Act, paragraph (b), sub-paragraph (7a), Section 303, Title 49 of the Code, where the word is used with its proper meaning of "uninterrupted." (See Lexicographers).

The Commission, sustained by the Court, throughout its opinion disregarded the words "within the territory," and construed the words "so operated" after June 1, 1935, to mean "continuity" of operations after that date.

The Commission found:

> "In view of applicants' holding out to serve a territory, services from and to these representative points will be considered as proof of bona fide operation from and to all points in these four counties." (Sheet II).

Immediately after the finding copied above, the Commission denied the right to operate in certain counties because

such counties "have not been served continuously." (Sheet II, last paragraph)

There were, as found by the Commission, interruptions varying in different states, but there is no evidence and no finding which remotely indicates that applicant failed at any time to serve any shipper who offered freight "within the territory for which application is made."

The Commission also found: 4,400 shipments after June 1, 1935, and 450 prior thereto, "within the territory." 4,850 shipments are "substantial." Considered in relation to size and in the light of growth since, the operation was substantial and was established in all the territories asked for. The evidence showed not only largely increased facilities at the time of the latest hearing, but an enlarged transportation service. (Note the list of movements and additional evidence in Exhibit "A" the Commission's Report, attached to appellant's petition, Sheets 3-6).

This construction of the law and this lack of findings present a substantial controversy not heretofore decided by the Supreme Court, and it is respectfully submitted that the principles of the decisions of the Supreme Court conflict with the opinion of the trial court in this case. *Howard Hall* v. *United States,* 315 U. S. 495; *Thomson* v. *United States,* 321 U. S. 19. The Commission itself has construed "continuity" differently in different cases.

Wherefore, it is respectfully submitted that the jurisdiction of this Court lies, and that this appeal is the appropriate way of invoking its jurisdiction.

This tenth day of August, 1944.

EDGAR WATKINS,
Attorney for Appellants.

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Edgar Watkins, 1207 Citizens and Southern National Bank Building, Atlanta, Georgia.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, GREENSBORO DIVISION.

Civil No. 219 G.

Filed August 1, 1944.

GUY M. TURNER and FRANK B. TURNER, doing business as TURNER'S TRANSFER, Plaintiff,

Versus

UNITED STATES and INTERSTATE COMMERCE COMMISSION, Defendants.

On Application for Injunction

(Argued July 10, 1944. Decided)

Before Parker, Circuit Judge, and Webb and Hayes, District Judges.

William M. York, LaFayette C. Dotson, Edgar Watkins for Turner's Transfer; Edward Dumbauld, Special Assistant to the Attorney General, Wendell Berge, Assistant Attorney General, Carlisle W. Higgins, United States Attorney, Bryce R. Holt, Assistant United States Attorney, for United States; Daniel W. Knowlton, Chief Counsel, Interstate Commerce Commission, and Edward M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, for Interstate Commerce Commission.

HAYES, District Judge:

This is a suit under 28 U. S. C. A. 43-48 to set aside and enjoin an order of the Interstate Commerce Commission granting to the applicant a certificate of necessity for less territory and restrictions as to commodities less than that for which he applied. The findings in the report of the Commission were made by Division 5 of the Commission

on December 30, 1943, No. M. C. 66691. The Commission had made a prior report, 27 M. C. C. 131.

For convenience the territory applied for and refused and the commodities applied for and refused will be enclosed in parenthesis. The application under the 'grandfather clause' sought a certificate of public convenience as common carrier over irregular routes of, (1) general commodities (a) between points in North Carolina, South Carolina, and Virginia and (b) between points in those three states, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New York, New Jersey, Connecticut, Rhode Island, and Massachusetts; (The Commission granted the petition to the extent of territory of points in Guilford, Randolph, Chatham and Alamance Counties, North Carolina, on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md. and all points in Ohio traversing West Virginia and District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction.); (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, construction materials and other heavy or bulky commodities requiring the use of special equipment between points in (Alabama), (Georgia), (South Carolina), North Carolina, (Tennessee), (Virginia), (West Virginia), (Ohio), (Indiana), (Michigan), (Illinois), (District of Columbia), (Maryland), (Delaware), (Pennsylvania), (New Jersey), (New York), (Connecticut), (Rhode Island), and (Massachusetts).

The Commission allowed the application between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York,

Connecticut, Massachusetts, Rhode Island, and District of Columbia, and empty machinery cases (wooden boxes) from all points in North Carolina to Reading, Pa.

With respect to general commodities the Commission analyzed the evidence thoroughly and said,

> "In our opinion the Greensboro area is the only area which was served substantially prior to the statutory date with a sufficient variety of commodities to establish a general commodity service * * * we conclude that applicants have been in bona fide operation prior to June 1, 1935 and continuously since, from and to points in Guilford, Randolph, Chatham and Alamance Counties, in North Carolina and that these four counties constitute the base area served by applicants in the transportation of general commodities."

The Commission further stated,

> "Although the operations conducted prior to June 1, 1935 may have been more extensive than those authorized herein, applicant can not be granted 'grandfather rights' to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion we have been guided by the principles announced by the Supreme Court in U. S. v. Carolina Freight Carriers Corporation, 315 U. S. 475."

At the second hearing the Commission considered all of the evidence that had been produced including the evidence that was produced at the first hearing. Its findings of fact are in line with what has been stated above and to avoid undue length they will not be restated here.

The complainant contends that the findings of the Commission necessitate a reversal because of an erroneous application of the law to the facts found; that irregular routes necessarily negative continuity; that substantial and continuous service from June 1, 1935 to the filing of the petition do not apply to carriers over irregular routes; that the Commission's ruling would require a carrier to go re-

gardless of whether he had freight to haul and relies on *Thomson* v. *United States*, 321 U. S. 19, to sustain his contention. The facts in that case were not disputed. The Supreme Court said:

> "The railroad alone is entitled to common carrier 'grandfather's rights as to the motor vehicle service forming an integral part of its unified freight service. Any other conclusion would authorize the wholesale granting of twenty-three 'grandfather' permits to the various motor vehicle operators on the basis of this single transportation service offered by the railroad—a result which ascribes to Congress an intent incompatible with its purpose of regulation."

The Substantiality and continuity of service was not in dispute. The Commission had held that the railroad was not entitled to the certificate because it had procured the service to be rendered by twenty-three independent truck contractors. We are unable to find anything in that case which sustains the complainant here. Nor does U. S. v. Carolina Carriers Corporation, 315 U. S. 475, (38 Fed. Supplement, 549) help complainant. The Commission applied the law of that case in its disposition of the application here. That case involved a carrier over irregular routes. As to the power of the Commission to limit the territorial scope of operations, the Court there said:

> "While service to and from all points in the states included in the application was not allowed, the reduction was determined by the standard of substantiality of service, and consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed."

Measured by this standard, the instant case as to the scope of territory is peculiarly one for the Commission. We find no error in this regard.

In *Bush Transfer, Inc.* v. *United States,* 53 Fed. Supp. 640, this court had occasion to consider the construction of the statute with respect to carriers over irregular routes as to territorial scope and restrictions on commodities and Senior Circuit Judge Parker said:

> "With respect to the limitation of commodities authorized to be carried in north-bound transportation, we think that this, as well as points to be served, was a matter to be determined by the Commission in application of the standard of substantiality of service within the critical period. The record discloses that, notwithstanding a somewhat broader holding out, the north-bound service of plaintiff during the critical period had been confined to the transportation of new furniture, and we think that the Commission was acting in the proper exercise of its power in limiting authority under the certificate accordingly. As said by the Supreme Court in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 483, 62 S. Ct. 722, 727, 86 L. Ed. 971: "It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities."

The evidence in the record affords a reasonable basis to sustain the findings of the Commission both as to territorial scope and commodities to be carried. Congress conferred upon the Commission the power to form its judgment and to enter appropriate orders. There is no error justifying this court to set the order aside.

From what has been said it is not necessary to devote more comment to the contention that the Commission erred by requiring continuity of service after June 1, 1935. It is urged here that the statute does not require continuity subsequent to June 1. The Act (49 U. S. C. 306) directs the Commission to issue a certificate of necessity to a carrier who "was a bona fide operation as a common carrier by motor vehicle on June 1, 1935 and has so operated since that time * * * except * * * interruption of service over which applicant * * * had no control." Bona fide operation as a com-

mon carrier means substantial as distinguished from occasional or sporadic service. *U. S.* v. *Carolina Freight Carrier Corp., supra.* The phrase "and has so operated since that time" means continued bona fide operation as a common carrier. If substantial service prior to June 1, is essential to the granting of the certificate, it follows that the carrier must continue in that bona fide operation if he secures a certificate. To hold otherwise would delete from the Act the words "and has so operated since that time". This the court will not do. It is therefore the duty of the commission to consider the evidence and to determine from it whether there was bona fide operation as a common carrier before June 1, 1935; if so, whether that bona fide operation continued since that time. These are questions of fact for the determination of the Commission from the evidence produced. The weight of that evidence is for the Commission not the courts. The evidence here is substantial, supports the findings and no error of law is discovered to vitiate the findings.

For the reasons stated the injunction will be denied and the suit dismissed.

Injunction denied and suit dismissed.

JOHN J. PARKER,
United States Circuit Judge, Fourth Circuit.
E. Y. WEBB,
United States District Judge, Western District of North Carolina.
JOHNSON J. HAYES,
United States District Judge, Middle District of North Carolina.

FILED
OCT 2 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

GUY M. TURNER and FRANK B. TURNER, Doing Business as TURNER'S TRANSFER,
Appellants,

versus

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

Number 473.

BRIEF OF APPELLANTS IN ANSWER TO MOTION TO AFFIRM.

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September 29, 1944.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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BRIEF OF APPELLANTS IN ANSWER TO MOTION TO AFFIRM.

A reply to Appellees' motion to affirm, which reached counsel September 16, 1944, is due before the record can be printed. For the convenience of the Court the opinion of the Commission, and of the District Court, are attached to this reply. The Commission's opinion is not to be printed in full in its printed volume. The Court's opinion has not yet been printed in the Federal Supplement. Page references are to the unprinted transcript.

JURISDICTION.

Jurisdiction of this appeal is shown in the Statement of Jurisdiction filed in the lower court, copied in the transcript, and to be printed by the Clerk of this Court.

SUMMARY OF THE ISSUES.

Here, if the Commission's order is confirmed, an extensive and growing business involving a large investment of capital will be practically destroyed, and a service useful to the public discontinued.

The Commission's failure to make findings of fact supporting its conclusions will be excused.

The Commission's disregard of controlling statutory language, "holding out," "so operated since" June 1, 1935, "within the territory of operation," over which "applicant * * * had no control," will be approved.

Adding to the statute the requirement of "continuity" by the Commission, will be accepted in lieu of the statutory language.

The denial of radial operations in hauling heavy machinery, making this special and unique service unavailable to many shippers of such machinery heretofore served, will be made effective.

Conflicting conclusions on similar facts in the report of the Commission herein will be condoned.

The practice of the Commission to grant or withhold operating rights when there had been interruption not within the control of the carrier, will become permanent, thus leaving the Commission arbitrary power.

These results of an affirmance here, we believe, is in conflict with decisions of this Court, and certainly in conflict with some of the opinions of the Commission.

ARGUMENT AND AUTHORITIES.

The law as stated in **Florida v. United States (1931), 282 U. S. 194, 215,** and followed since, is that the Commission must make findings of fact supported by evidence which justifies its conclusions. Here was a total lack of evidence and no finding supporting a conclusion that Appellants had abandoned any of its operations "within the territory for which application was made." There is undisputed evidence that such "interruptions of service" as were shown were those "over which the applicant * * * had no control." Both the Commission and the trial court, which affirmed its order, assumed that the lack of "continuity" over certain routes justified a denial of rights thereover. In the evidence before the Commission there is no testimony that such interruptions as did occur could have been controlled by appellants; nor does the Commission or the Court make any finding of such fact. Indeed, the Commission, in a former opinion, found facts which show that appellants did all they could to get commodities to transport. **27 M. C. C. 131, 132.** On this point the record at the hearing is clear and undisputed. The stenographic record of hearings before the Commission was sent up as Part Two of the transcript. To this we refer—

Witness (Guy M. Turner). Cross-Examination. Stenographic Report of Hearing before the Commission, pages 27, 28:

> "Q. Did you make it a practice to solicit truckload shipments when you were out from Greensboro?
> "A. In solicitation, we did make it a practice to get all we could."

Same witness: Questions by Examiner, Record, pages 29, 30, 31, 32 and 33:

"Q. In other words, you have tariff rates published?
"A. Yes, sir.
"Q. Are those rates on file with the Interstate Commerce Commission?
"A. Yes, sir."

"Q. Do I understand that you hold yourselves out to transport general commodities?
"A. Yes, sir.
"Q. Whether you get them or not, to transport?
"A. That is correct."

Witness: D. H. Lambert, a shipper, Record, page 293:

'Q. Mr. Lambert, let me ask you this, from the very beginning, that is in 1934 and 1935, specifically did Turner's Transfer solicit you for what traffic you had?
"A. They solicited us; yes, sir.
"Q. Just how did they solicit you?
"A. Well, Mr. Turner called in person or his brother, the two Turners, and called us on the telephone every few days.
"Q. Did Turner's Transfer ever refuse to haul any traffic which you tendered to them?
"A. No, sir.
"Q. Did you understand that they were available to you at any point where you might wish to use their services * * *?
"A. Yes, available any time."

Unless the Commission "applied the proper criterion in reaching its conclusion," you have held that you would "disturb these conclusions," without a consideration of the weight of the evidence. **United States v. Carolina Carrier Corp. (1942), 315 U. S. 475, 483.** In this case "substantial" service was required, but you said that interruption of service

> "does not necessarily mean that they should be stricken from the certificate, since the natural and normal course of his business may reveal a continuous undertaking to transport any or all commodities embraced within the group or the class."

Here we find "continuous undertaking." It was also said at page 483:

> "The Commission may not atomize his prior service, product by product, so as to restrict the scope of his operations, where there is substantial evidence in addition to his holding out that he was in 'bona fide operation' as a 'common carrier' of a large group of commodities or of a whole class or classes of property."

While the Court was in these quotations speaking of commodities, the rule is equally applicable to routes, as appears from the Court's discussion at page 487 where, speaking of routes, it was said:

> "In absence of evidence that it had thus limited its undertaking as respects beer, the mere fact that it previously had not carried beer from Baltimore would be immaterial. If it had established by substantial evidence that it was a 'common carrier' of beer on southbound trips, it would be entitled to carry it from any of the northern points to any of the southern destinations."

Congress enacted a statute which shows there is a need for irregular route carriers. The substantiality of an irregular route carrier's service is necessarily in proportion to the demand for such service, and irregular is a negation of continuous. Such "demand" was met adequately by applicants whenever service was needed.

In the Carolina case, as here, the record is plain that applicant, as the Commission found, "held itself out as

being willing and able to carry a wide variety of commodities" to all the radial territory. There, as here, applicant's rights were "drastically limited." There it was held, as is true here, "there is no statutory sanction for such a procedure." There the order of the Commission was set aside, and to follow that case means that applicants should have been granted the rights they seek. As said in the **Howard Hall** case, decided with the Carolina case (315 U. S. 495, 501), "The inference of the (Commission's erroneous view) * * * permeates the findings." It will be noted that here, as in the **Howard Hall** case, there is no finding that applicant did not at all times hold himself out to serve all the territory.

The **Carolina** and the **Howard Hall** cases are followed in the later decision of this Court in **Thompson v. United States (1944), 321 U. S. 19.** It was there said:

> "The railroad has consistently held itself out to the general public and to shippers as being engaged in this coordinated motor-rail freight service . . . The shipper does not know in a specific instance whether his freight will be shipped entirely by rail or partly by motor vehicle. But he is informed by the railroad's tariffs that the railroad at its option may substitute motor vehicle service for rail service."

Appellants' tariffs required by law, published and filed with the Commission, show that they were offering to haul freight over all the routes for which they seek a certificate. Here the general public knows that the applicants, by their tariffs, advertising, and solicitation, are engaged in, and authorized to, and do, perform the service covering the broad territory, rights to which are asked. In the **Thompson** case the Commission was reversed. Said the Court:

> ". . . not from a lack of substantial evidence to support its conclusions . . . rather it is due to an incorrect application to these facts of the statutory provisions and Congressional intention relating to 'grandfather' rights of common carriers by motor vehicle."

This Court, also, in its opinion in the **Thompson** case, refers to the statute and to the word "undertakes" and to the words "which holds itself out to the general public," added for purposes of clarification in 1940. It is the nonapplication of these statutory words that explains the erroneous conclusion in this case.

This Court also referred to "coordinated" motor-rail freight service "forming an integral part of its unified freight service." Here, the whole service of appellants is coordinated and integrated, serving the public when there is a demand.

Not only is there a lack of evidence and findings to support the conclusions of the Commission, that tribunal is inconsistent in its conclusions.

The Commission, referring to General Commodities, said:

> "Considering the record as a whole, we conclude that applicants have been engaged in the transportation of general commodities, with certain exceptions, prior to June 1, 1935, and continuously since."

Later, it said:

> "We conclude that applicants have substantiated their claim to a 'grandfather' right to transport household goods between points in North Carolina, on the one hand, and, on the other, points in the District of Columbia and all 18 States."

Even as to particular states "within the territory" the

Commission was inconsistent and arbitrary. We quote from the Appendix to its report:

Shipments Since 1935 to 1941, Inclusive:

Indiana (denied)	106
Ohio (granted)	444
Illinois (denied)	1832

It will be noticed that appellants' shipments of all commodities were in 1936, 158, and that such shipments were more for each year thereafter than for 1936, reaching in 1941 a total of 2160 (Appendix to Commission's Opinion, Tr. p. 22).

This with the undisputed evidence that Appellants largely increased their investment and facilities; and by different forms of advertising and personal solicitation, sought traffic and hauled all that was offered, showed that the Commission could not have made a finding of abandonment.

The Commission has been inconsistent and arbitrary in its former decisions on the issue of interruptions of traffic. We shall refer to only a few of these cases.

The Court in **Transamerica Freight Lines (1943), 51 Fed. Supp. 405**, sought vainly to find a "schema in the various rulings of the Commission," and appended Note 9 to show its conflicting rulings.

In 1937, the Commission in **J. Norman Geipe, etc., 1 M. C. C. 693**, decided that household goods move "at infrequent intervals, if at all."

In **Bruce Transfer (1937), 2 M. C. C. 150**, it spoke of operations "only in the event shipments to points thereon were tendered."

In **Charles B. Greer, Jr. (1937), 3 M. C. C. 483**, the **Geipe** case was followed, and the Commission found that "opera-

tions are dependent upon the activity in the oil fields." Here, appellants' operations are dependent upon the activities of all their customers. In **Bigley Brothers, etc. (1938), 4 M. C. C. 711,** the Commission found:

> ". . . applicants have held themselves out to transport, and have actually transported, anywhere for those desiring their service."

The same general rulings that shippers dictate the frequency and quantity of shipments, see **Harry Paschall Contract Carrier Application (1939), 14 M. C. C. 224,** and **Barnes Truck Co., Inc. (1940), 24 M. C. C. 465, 467.**

In **Carpenter, Common Carrier (1942), 32 M. C. C. 580, 582,** a grandfather application was granted in 1940 when it was found:

> "It is admitted that no transportation has been performed from these points since 1937. Applicant has solicited shippers at various times, but without success. He contends that the cessation is one over which he has no control, and that he is ready and willing to resume this operation if and when he is able to obtain the traffic."

The Commission in the instant case and in its former decisions has exercised the right "capriciously to make findings by administrative fiat," of which this Court said:

> "Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power." **Int. Com. Com. v. Louisville & N. R. Co. (1913), 227 U. S. 88.**

In their motion to affirm, appellees cite **United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 480-481.**

This case, as we have discussed above, supports Appellants' contentions.

Alton R. Co. v. United States (1942), 315 U. S. 15, occurs in appellees' brief. This case supports our contention here, as appears from two short quotations from the opinion therein, where it is said:

> "The determination of 'grandfather' clause rights in the case of movers of household goods is attended with difficulties. Calls for service between the same points are seldom repeated. Traffic is not regular in any given direction. * * * It would be an impractical solution to carve out oddly shaped areas for service based solely on the frequency of service; consideration must also be given to the general territory served under the holding-out, even if the business in some States may not equal that in other States in the territory."

It is true that the Court in the **Alton** case was discussing the commodity of household goods. Here the Commission as to such goods said:

> "Points in the other 13 states were served at least one of these subsequent years" (1936-1941).

In **Gregg Cartage & Storage Company v. United States (1942), 316 U. S. 74,** there was a cessation of operations from 1937 because of bankruptcy proceedings against the applicant. In the decision of the Commission, **21 M. C. C. 17, 18, 19,** the issue was stated:

> "This proceeding presents the question whether the interruption in service due to bankruptcy was one over which applicant had no control within the meaning of the respective exceptions in sections 206 (a) and 209 (a) of the act."

The Commission and the Courts in the **Gregg case** agreed that if bankruptcy was not "within the control of the"

applicant, a certificate should issue. A majority in all these tribunals agreed that the applicant did have control of the bankruptcy, but all applied the statute that interruptions before being effective must be in control of the applicant. The applicants here were not only not shown to have any control over the interruptions, but the undisputed evidence showed they had no such control. The decision, applied to the facts here, shows that this case should be decided in favor of appellants.

In **United States v. Maher (1938)**, referred to in the **Gregg Cartage** case above, the applicant had originally an irregular service, but this he abandoned and began a new service, which the Commission found, as stated by this Court:

> "had only been instituted on May 29, 1936. Theretofore, and including the crucial period prior to June 1, 1935, the appellee had been engaged in quite different services from those for which it asked a certificate, . . ."

In the **Lubetich case**, also cited in the Gregg case, the Commission, as stated by this Court, found:

> "Between June, 1935, and January, 1938, most, if not all, of the traffic handled by appellant was solicited and billed by other motor carriers and moved in appellant's vehicles only between the terminals of those other carriers. From April, 1937, until January, 1938, appellant hauled exclusively for a single common carrier, Hendricks Refrigerated Truck Lines, Inc., * * * On the basis of its findings, the Commission concluded that the service performed 'was not the fulfillment of engagements in consequence of a holding out to the general public, but was primarily the hauling of traffic for motor common carriers.' "

The **Hoey** case, also referred to in the Gregg case, was decided upon a mere citation of cases. From an exam-

ination of cases cited it would seem that the issue as stated in the first of the cited cases, was determined by the principle:

> The Commission's "conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

It is respectfully submitted that the motion to affirm should be overruled.

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September 29, 1944.

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Certificate of Service.

This is to certify that two copies of this brief have this day been mailed to Honorable Wendell Berge, Assistant Attorney General, Washington, D. C., and to Edward M. Reidy, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

This 29th day of September, 1944.

.....
S. W. Hyer.

REPORT OF THE COMMISSION ON FURTHER HEARING.

Division 5, Commissioners Lee, Rogers, and Patterson.

By Division 5:

Exceptions were filed by applicants and protestant rail carriers to the order on further hearing recommended by the examiner, and certain protestants replied to applicants' exceptions. Our conclusions differ in some respects from those recommended.

By application filed February 8, 1936, under the "grandfather" clauses of sections 206 (a) and 209 (a) of the Interstate Commerce Act, and as amended on further hearing, Guy M. Turner and Frank B. Turner, copartners, of Greensboro, N. C., doing business as Turner's Transfer, seek a certificate of public convenience and necessity or a permit, authorizing continuance of operation, in interstate or foreign commerce, as a common or contract carrier by motor vehicle, over irregular routes, of (1) general commodities, except loose bulky commodities, currency, bullion, dangerous explosives, and articles of virtu, (a) between points in North Carolina, South Carolina, and Virginia, and (b) between points in those three States, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, con-

struction materials, and other heavy or bulky commodities requiring the use of special equipment between points in Alabama, Georgia, South Carolina, North Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts. Rail carriers in official and southern territories and several motor carriers oppose the application.

In the prior report, **Turner's Transfer Common Carrier Application**, 27 M. C. C. 131, decided December 18, 1940, division 5 authorized the continuance of operation by applicants as a common carrier by motor vehicle of special commodities between points in North Carolina, on the one hand, and, on the other, points in Alabama, Connecticut, Delaware, Georgia, Indiana, Maryland, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and the District of Columbia, over irregular routes, by reason of applicants having been so engaged on June 1, 1935, and continuously thereafter, and in all other respects denied the application. Upon applicants' petition for reconsideration and further hearing, the proceeding was reopened for further hearing and the order of December 18, 1940, insofar as it denied a portion of the application, was vacated and set aside. At the further hearing considerable additional evidence was adduced. The facts developed at both hearings will be restated herein.

Applicants have been engaged in the trucking business since 1922, and have maintained headquarters in North Carolina since 1926. They were registered under the N. R. A. code of fair competition for the trucking industry. On June 1, 1935, they owned 10 separate units of equipment and hired other equipment. At the time of the further hearing, March 3 and 4, 1942, applicants owned and

were operating 18 separate units composed of two straight trucks, seven tractors, and nine trailers. This equipment included vans for transporting household goods and other commodities, a drop frame semi-trailer for hauling extra heavy and high freight, and a 40-foot skeleton trailer for hauling extra long freight. Some of the units are equipped with power winches and applicants' drivers are experienced riggers. All of applicants' operations have been conducted on a call-on-demand basis over irregular routes. A large portion of their movements have been full truckloads but they have not restricted themselves to the transportation of truckload lots of freight.

Leased vehicles and the services of so-called owner-drivers have been employed by applicants to augment their own equipment. Lease arrangements were made by oral agreements prior to 1940 and by written contracts since that time. At all times, both prior and subsequent to the execution of the written leases, the methods of operation and instructions to the drivers were the same regardless of whether applicants' equipment or that of the owner-drivers was used. All shipments were transported under applicants' billing and drivers of the equipment were not permitted to solicit the traffic as applicants made all arrangements with the shippers. At the time of the further hearing all leased vehicles bore applicants' name. The leases provided that applicants were to be in possession of the vehicles of the owner-operators and to have control over such vehicles while operated in behalf of applicants. The leases also provided that applicants would procure cargo, personal liability, and property damage insurance to cover the operation of the leased vehicles. It is clear, under these circumstances, that the operations performed by the owner-drivers were those of applicants and that the latter are entitled to the benefit of the evidence covering such operations.

Although it is stated in the application that applicants operate as a common carrier, they request, in the alternative, that a permit be issued if the operations are found to be those of a contract carrier. They have held themselves out to haul for anyone desiring their services, by newspaper and telephone directory advertising, and by mail, telephone, and personal solicitation. It is clearly established that the operations have been those of a common carrier as defined in section 203 (a) (14) of the act.

As explained in the prior report, a list of movements was prepared by a representative of our Bureau of Motor Carriers from tickets covering the period prior to June 1, 1935. The movements were classified under three columns; namely (A) machinery and construction material requiring, in most instances, the use of special equipment, (B) household goods, and (C) commodities other than those included in columns A and B. The underlying tickets from which this list was prepared were destroyed by a fire in applicants' warehouse on May 4, 1937, and therefore the exact commodity description cannot be verified. However, these classifications are not disputed except in one respect. Applicants contend that 57 shipments from various North Carolina points to Reading, Pa., listed under column A should have been listed under column C. These shipments consisted of empty machinery cases (wooden boxes) from which textile machinery had been unloaded and which were then being returned to the machinery manufacturer. The movement of empty boxes is not incidental to transportation performed by applicants in the reverse direction inasmuch as the machinery which they contained was transported by rail carriers. Nor can they be considered as commodities requiring special equipment inasmuch as they can be transported in ordinary van-type vehicles. They appear to fall in the category of general commodities and, hence, the aforementioned shipments will

be included under that classification in our analysis of the documentary evidence.

At the further hearing applicants presented additional documentary evidence of operations in 1934 and 1933. One exhibit lists approximately 350 shipments transported in 1934, showing the date, pro number, commodity, origin, and destination as tabulated from tickets which were available for inspection at the hearing. These tickets were some which had not been submitted to our representative and which had not been destroyed in the fire as they were stored separately from the others. Another exhibit, showing similar information, lists approximately 100 shipments transported in 1933. This exhibit was based on entries in a cash book which served to refresh the memory of the witness, Guy M. Turner, as to other details respecting the shipments; namely, the commodity, origin, and destination. Applicants concede that these two exhibits cover most of the shipments transported in 1933 and 1934, and that the list submitted at the original hearing is representative of the shipments transported from January 1 to June 1, 1935.

The exhibits presented at the original hearing listed approximately 700 shipments from April 9, 1936, to December 29, 1938. At the further hearing new exhibits were presented listing, in round numbers, 900 shipments for the same period and 3,500 shipments for the years 1939, 1940, and 1941, or a total of 4,400 shipments. The underlying tickets and bills of lading were available at the hearing for the inspection of the parties. The new exhibits list all shipments transported by applicants from April 1936 to December 1941, and thus constitute a complete record of applicants' operations during most of the subsequent period. In view of their completeness, consideration will be given to the new exhibits in lieu of those presented at the original hearing. Obviously, this complete showing

affords a more reliable basis for determining the scope of applicants' operations since the statutory date.

In addition to the foregoing documentary evidence, applicants presented oral testimony by one of the partners, Guy M. Turner, five drivers, and six shippers. Turner, the principal operating witness, testified at length as to the development of the business and methods of operation, covering such matters as the type of commodities carried, the points served, the equipment used, and the manner of holding out and solicitation. His testimony in respect of the commodities carried and points served is reflected in the exhibits and, consequently, requires no separate discussion. The drivers were employed by applicants at various times prior to June 1, 1935, one each in 1928, 1932, and 1933, and two about May 1934. Generally speaking, they were unable to identify the year when particular trips were made, or the frequency of such trips, although they could recall the commodities carried and points served throughout their periods of employment prior to the statutory date. Inasmuch as practically all of the commodities and points mentioned by them are covered by documentary evidence their testimony requires no separate discussion.

One shipper, a general contracting company, did not employ applicants prior to June 1, 1935, and therefore the testimony of this shipper's witness need not be considered. Another shipper, a wholesale dealer in fruits and produce, was solicited by applicants prior to the statutory date for return loads to Greensboro. Applicants were given return loads of potatoes from Norfolk, Va., and onions from points in the vicinity of Warsaw, Ind., and Fremont, Ohio, at some time between 1930 and 1935. The shipper's witness was unable to specify the time with more particularity and thus his testimony is of little value as proof of actual operations. A manufacturer of textile products

used applicants' service in 1935 for a movement of cotton piece goods from Greensboro to Greenville, S. C., over a period of 60 days, after which time the movement ceased. However, the shipper's witness was unable to state whether this movement occurred prior or subsequent to June 1 of that year. This witness was also uncertain as to the time when applicants performed a similar movement from Greensboro to Chicago, Ill. He was certain, however, that prior to June 1, 1935, applicants had solicited his company for shipments of textile products, materials, and supplies moving from and to Greensboro. This testimony, like that just discussed, fails to prove actual operations but tends to substantiate applicants' claimed holding out to transport any available commodities prior to the statutory date.

A hardware company employed applicants in 1934 and 1935 to transport the following commodities to Greensboro: Screen wire, wire cloth, and chains, from York, Pa.; lawn mowers from Philadelphia, Pa.; and children's wheel goods and vehicles from Toledo, Ohio. This company was solicited by applicants for shipments of any available commodity from and to points in the territory claimed by them. A manufacturer of cough drops and medicinal preparations in Greensboro presented an exhibit listing all shipments transported by applicant in 1935 as compiled from its records. This exhibit lists 27 shipments prior to June 1, and 75 for the rest of the year. The former shipments consisted of cough drops, medicine, candy, printed matter, folders, glass, labels, methol, and camphor, and the latter shipments included the same commodities, and in addition, pamphlets, paper caps, and tins. All shipments moved between Greensboro, on the one hand, and the following points on the other: Boston, Mass., Baltimore, Md., and Philadelphia, prior and subsequent to June 1, 1935; Chicago, prior to that date; and Wilmington,

Del., subsequent to that date. This showing is typical of the service performed in 1934 and the years since 1935 except that new points have been served from time to time.

A manufacturer of textile machinery has employed applicants since prior to the statutory date for the transportation of empty machinery cases (wooden boxes) from mill points in North Carolina and South Carolina to its factory at Reading. This shipper's witness named the points of origin served in 1935 but did not have the information as to the exact points served prior to June 1, although he was certain that all of the points had been served at some time prior to that date. The named points include Albemarle, Asheboro, Asheville, Belmont, Burlington, Charlotte, Durham, Greensboro, High Point, Newton, Spindale, and Statesville, N. C. The witness mentioned additional points as having been served subsequent to 1935 as follows: Concord, Gastonia, Hendersonville, Liberty, Randleman, Siler City, Tyron, and Wadesboro, N. C., and Laurens and Rock Hill, S. C. He also explained that new points are served from time to time whenever new mills are established with the result that applicants' service is required from a territory rather than specific points.

The testimony of the hardware dealer, the manufacturer of cough drops and medicinal preparations, and the manufacturer of textile machinery, discloses that applicants transported certain commodities and served certain points prior to June 1, 1935. This oral evidence will be considered in conjunction with the documentary evidence in determining the scope of applicants' operations prior to that date. Their testimony also discloses similar information for the subsequent period, but reliance will be placed mainly on the documentary evidence covering this period as such evidence is complete.

As seen, applicants seek different grants of authority for the transportation of three distinct classes of property; namely, (1) machinery, construction materials, and other heavy or bulky commodities requiring the use of special equipment, (2) household goods, and (3) general commodities. Much of the documentary evidence for the period prior to June 1, 1935, was classified to show the transportation of these three classes of property. This classification is appropriate in view of the varied transportation characteristics of each class and the different authority sought for each class. In their brief, applicants have tabulated the documentary evidence for the years 1933-1934 and 1936-1941 according to these three classes. Our analysis of the documentary evidence will be based on their tabulations covering the respective classes. In the interest of clarity, the evidence as to each class will be discussed under a separate caption.

Commodities requiring special equipment.—This class of property includes heavy and unwieldy articles; for example, boilers, silos, gas and water tanks, structural steel, and carnival equipment. It also comprises several kinds of machinery such as those used by road and bridge builders, well drillers, textile mills, and electric power plants. Skids and necessary equipment used in moving the foregoing commodities have been returned to the original shipping points as an incidental matter.

Applicants have given special attention to the transportation of heavy and unwieldy articles and have advertised themselves as "moving engineers". As heretofore indicated, they have specially designed vehicles and experienced employees for handling of this type of traffic. Throughout the years they have devoted considerable effort to the solicitation of this particular traffic and have developed it into an important part of their business. From time to time jobs requiring special equipment have

been referred to them by motor common carriers of package freight. Applicants claim that they have held out to transport commodities requiring special equipment in nonradial operations between all points in 19 States and the District of Columbia as named in the amended application.

This class of traffic has moved chiefly from and to points in North Carolina, applicants' home State, according to an analysis of the shipments transported from 1933 to 1941. The points served are located in all sections of the State; for example, Roanoke Rapids, Kingston, and Fayetteville in the eastern section, Greensboro, Mooresville, and Monroe in the central section and Lenoir, Marion, and Hendersonville in the western section. Since the movement of this traffic depends on the location of construction sites and the establishment and abandonment of mills and factories at different points from time to time, a state-wide grant of authority is appropriate. We conclude that applicants have been engaged in radial operations from and to a base territory comprising all points in North Carolina.

Having determined that the base territory includes points in North Carolina, we next consider the geographical scope of the outlying territory. Prior to June 1, 1935, shipments were transported between points in North Carolina, on the one hand, and, on the other, points in 12 States; namely, Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and Illinois. Since the statutory date all of these States have been served with a fair degree of regularity, except Connecticut and Illinois. Connecticut has not been served since June 1, 1935. Illinois was not served from June 1, 1935 until April 1941, a lapse of service of over 5 years for which no explanation was given. Furthermore, this State is remote from the other States regularly served as they form a fairly compact territory along the Atlantic sea-

board from Georgia on the south to Massachusetts on the north. In serving this territory, operations would normally be conducted through Connecticut, Delaware, and the District of Columbia, and appropriate authority to conduct such operations will be granted. We conclude that applicants are entitled to "grandfather" rights for the transportation of commodities requiring special equipment and handling by reason of size or weight, and machinery, between points in North Carolina, on the one hand, and, on the other, points in Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Massachusetts, and Rhode Island, traversing Connecticut, Delaware, and the District of Columbia for operating convenience.

This conclusion limits applicants to radial operations, although they claim non-radial operations between points in 19 States and the District of Columbia as named in the amended application. The exhibits list only two non-radial shipments for the period prior to June 1, 1935, one from Philadelphia to Covington, Va., and the other from Long Island City, N. Y., to Virginia Beach, Va. No non-radial shipments are shown to have been transported subsequent to the statutory date until 1940, when one shipment is listed between points in South Carolina and Tennessee. In 1941, 65 non-radial shipments are listed between points in various States, thereby indicating that this service has been developed quite recently. We conclude, therefore, that applicants' non-radial operations were occasional and sporadic prior to June 1, 1935, and subsequently until 1941, and that such operations have not been consistent with their claimed holding out to serve all points in the 19 States and the District of Columbia. It follows that this holding out must be disregarded and their claim of non-radial operations must be denied.

Household goods—Shipments of household goods were transported prior to June 1, 1935, between points in North Carolina, on the one hand, and, on the other, points in the District of Columbia and 18 States; namely, Alabama, Georgia, Tennessee, South Carolina, Virginia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, West Virginia, Ohio, Indiana, Illinois, and Michigan. In each of the years 1936 to 1941, both inclusive, similar shipments were transported between points in North Carolina and points in the District of Columbia, South Carolina, Virginia, Pennsylvania, New York, and Connecticut. Points in the other 13 States were served in at least one of these subsequent years. In view of the infrequent and irregular nature of household movings, we have been liberal in our requirements as to continuity of service and points served for this class of traffic. In our opinion the continuity and scope of applicants' service establishes a bona fide operation in the transportation of household goods between points in North Carolina and points in those States which have been served both prior and subsequent to the statutory date. Accordingly, we conclude that applicants have substantiated their claim to a "grandfather" right to transport household goods between points in North Carolina, on the one hand, and, on the other, points in the District of Columbia and all 18 states; namely, Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York, Connecticut, Massachusetts, and Rhode Island.

General commodities—This class includes commodities other than household goods and commodities requiring special equipment. In the prior report we found that the principal commodities in this class consisted of printed matter, tin bottle caps, glass bottles, cough drops, camphor,

and other related articles. All of these commodities are dealt in, or used by, a manufacturer of cough drops at Greensboro for whom applicants have transported considerable traffic. At the further hearing applicants presented additional evidence of the exact commodities transported, both prior and subsequent to the statutory date, for the purpose of showing that they have never restricted their undertaking to any particular group of commodities. This evidence discloses the transportation prior to June 1, 1935, of approximately 20 additional commodities, such as fresh and smoked meats, live poultry, lard, cotton and wool yarn, millwork, roofing, petroleum products, tires and tubes, hardware, matches, and canned goods. Practically all of the commodities moved in radial operations from or to points in North Carolina, some in one direction only, and a few in both directions. A wider variety of commodities was transported inbound to North Carolina than outbound from this State. However, there is no basis for finding that applicants' operations or their holding out differed essentially in one direction than in the other. Some of the commodities were transported only once or twice, and some 10 times or more, but the frequency of movement of any particular commodity is not controlling since the evidence as a whole shows that a sufficient variety of general commodities was in fact transported with a fair degree of regularity prior to June 1, 1935. Subsequent to that date the variety of commodities remained about the same until 1940 and 1941, when numerous diversified commodities were added. Considering the record as a whole, we conclude that applicants have been engaged in the transportation of general commodities, with certain exceptions, prior to June 1, 1935, and continuously since.

With respect to the transportation of general commodities, applicants claim "grandfather" rights for (1) radial

operations between the base States of North Carolina, South Carolina, and Virginia, on the one hand, and several outlying States, on the other, and (2) non-radial operations between points in the three base States. Prior to June 1, 1935, radial operations were conducted almost exclusively from and to North Carolina as 737 shipments moved from and to this State in contrast to five shipments from and to South Carolina and five from and to Virginia. The total of 737 shipments includes eight shipments between South Carolina and North Carolina and 44 between Virginia and North Carolina which will be considered as proof of radial operations from and to North Carolina. The ten shipments transported from and to South Carolina and Virginia are insufficient to establish radial operations from and to these States. As for the claim of non-radial operations between points in Virginia, North Carolina, and South Carolina, we have indicated that shipments between North Carolina and South Carolina, and between North Carolina and Virginia will be considered in connection with radial operations from and to North Carolina. No shipments were transported between South Carolina and Virginia. In the circumstances, we conclude that applicants are not entitled to a grant of non-radial authority.

For ready reference we have prepared an appendix tabulating the shipments of general commodities transported in radial operations between the base State of North Carolina and the outlying territory prior to June 1, 1935, and subsequently from 1936 to 1941. The outlying territory consisting of 18 States and the District of Columbia has been divided into three geographical groups as shown in the appendix. Prior to the statutory date all of these States were served at least once except Tennessee and Alabama. These two States were not served at all and hence must be excluded. Certain other States were served only a few times each but any doubt as to the substanti-

ality of this service will be resolved in applicants' favor since the evidence is merely representative rather than complete. No such doubt exists in respect of the subsequent period as the evidence is complete from 1936 to 1941 and, thus, affords an accurate measure of the substantiality and continuity of the service rendered since the statutory date. As a premise in the determination of "grandfather" rights herein, we shall proceed on the assumption that applicants were in bona fide operation prior to June 1, 1935, between points in North Carolina, on the one hand, and, on the other, points in the District of Columbia and all of the claimed States, except Tennessee and Alabama.

During the subsequent period applicants' service from and to certain outlying States has been non-continuous. Connecticut has not been served at all, and Rhode Island and Massachusetts were not served in 1938, 1940, and 1941. This lack of continuity indicates a virtual cessation of operations from and to these three New England States and precludes the grant of "grandfather" rights from and to such States. From 1936 to 1941, applicants transported 29 and 53 shipments from and to points in New York and New Jersey, or an average of 5 and 9 shipments a year, respectively. Most of these shipments moved from and to New York City and the Newark area in northern New Jersey. This service cannot be called substantial when consideration is given to the traffic potentialities of these two important areas, particularly when it is noted that the neighboring State of Pennsylvania was served more than 100 times a year, on the average, during the same 6-year period. In our opinion the service rendered from and to New York and New Jersey fails to measure up to what would reasonably be expected of an operator endeavoring to give a good-faith service in the transportation of general commodities between these two States and the base State of North Carolina. Clearly, applicants' service from

and to Pennsylvania has been substantial. The service from and to Maryland has averaged 25 shipments a year and thus has been substantial. Delaware was not served in 1936 and 1941, nor the District of Columbia in 1936, 1940, and 1941, and hence, both will be excluded for lack of continuity. Virginia was served every year from 1936 to 1941 with an average of nine shipments a year. In view of the proximity of Virginia to the base State of North Carolina and the traffic potentialities of these two States we cannot say that this service was substantial. We conclude that Pennsylvania and Maryland are the only seaboard States which have been served substantially and continuously since the statutory date.

We next consider applicants' service from and to the southern States. South Carolina was not served in 1938 and only occasionally in 1936, 1937, and 1939, thereby showing an infrequent and non-continuous service during the four years following the statutory date. Georgia was served continuously from 1936 to 1941 but the service during the four years following the statutory date was infrequent. Both States were served a number of times in 1940 and 1941 but such service cannot alter the occasional nature of the service performed prior to that time. It is evident that applicants' service from and to these nearby States did not achieve any degree of substantiality until 1940. As heretofore seen, Tennessee and Alabama were not served prior to the statutory date and, hence, no consideration need be given to the service rendered subsequently. In our opinion the evidence fails to warrant the grant of "grandfather" rights to serve any of the four southern States.

Finally, we turn to the interior States lying inland from the Atlantic Seaboard. Subsequent to June 1, 1935, no service was rendered from and to West Virginia until March 1941, or from or to Michigan at any time. Both

States will be excluded for lack of continuity. Applicants' service from and to Illinois involved the transportation of the following shipments: None in 1936, three in 1937, one in 1938, none in 1939, 58 in 1940, and 1,770 in 1941. This phenomenal increase in 1941 may be attributed to the establishment of an office in Chicago. The fact that only four shipments were transported from 1936 to 1939 indicates a virtual cessation of operations from and to Illinois during the 4-year period following the statutory date. In view of the long hiatus in applicants' operations, including the lack of any service during the years 1936 and 1939, we cannot say that applicants have served points in Illinois substantially and continuously since June 1, 1935. The unusual increase in traffic since 1940 must be considered as evidence of a new operation rather than the continuance of the former sporadic operation. Applicants' claim of "grandfather" rights to serve Illinois must be denied. Indiana was served from 1936 to 1941 with an average of five shipments a year until 1941 when 82 shipments were transported. The service during the five years from 1936 to 1940 must be treated as occasional and unsubstantial, particularly when compared with the service rendered from and to the adjoining State of Ohio during the same period. Ohio was served continuously from 1936 to 1941 with an average of 26 shipments from 1936 to 1939, and an average of 170 shipments in 1940 and 1941. In our opinion applicants have rendered a good-faith service between North Carolina and Ohio but not between North Carolina and Indiana. We conclude that Ohio is the only interior State which applicants have served substantially and continuously since the statutory date. Summing up, applicants have been in bona fide operation prior to June 1, 1935, and continuously since, between the base State of North Carolina and the outlying States of Pennsylvania, Maryland, and Ohio.

Having determined the States served by applicants during the prior and subsequent periods, we next consider the points and areas served in the respective States of North Carolina, Pennsylvania, Maryland, and Ohio. As seen a total of 737 shipments were transported from and to points in the base State of North Carolina prior to June 1, 1935. Of these shipments approximately 525 moved from and to Greensboro and approximately 100 from and to points within a 35-mile radius of Greensboro, for example, Winston-Salem, Siler City, Burlington, and Leaksville, N. C. The 100 remaining shipments moved from and to points located throughout the State, from Wilmington on the east to Asheville on the west. However, only a few sporadic shipments were transported to these scattered points, with one exception. Thirty-three shipments were transported from and to Charlotte but 27 of them consisted of empty machinery cases and six other commodities. These few shipments of other commodities are insufficient to establish a good-faith service prior to the statutory date in the transportation of general commodities from and to Charlotte. We may reasonably expect that a greater number and variety of shipments would have been transported from and to this point since it is the largest city in the State, with a population of 100,000.

Shipments of empty machinery cases were transported prior to June 1, 1935, from Charlotte and other points in North Carolina such as Durham, Albemarle, Newton, and Asheville. This transportation has been continued from representative points in the State since that date. As seen from the testimony of the shipper witness, this particular traffic has moved from scattered points in the State to one destination, Reading. Such transportation, confined as it was to one particular commodity moving to one point of destination, can not establish a general-commodity operation between all points in North Carolina and the numerous

points claimed in the outlying territory. Instead, it establishes a special-commodity operation which applicants will be authorized to continue by our findings herein.

In our opinion the Greensboro area is the only area which was served substantially prior to the statutory date with a sufficient variety of commodities to establish a general-commodity service. This area may be described roughly as including Greensboro and points within a radius of 35 miles thereof. Since the statutory date this general-commodity service has been continued from and to the 35-mile area around Greensboro, but only from and to certain portions thereof. The only portions served with any degree of substantiality and continuity include Greensboro, in Guilford County, and points south and east thereof, namely, High Point in the same County, Asheboro and Liberty in Randolph County, Siler City in Chatham County, and Burlington in Alamance County. In view of applicants' holding out to serve a territory, service from and to these representative points will be considered as proof of bona fide operation from and to all points in these four counties. In the portions of the area north and west of Greensboro, no service was rendered from or to Caswell County at any time, Rockingham County in 1936, 1937, and 1939, Stokes County in 1936, 1939, and 1940, Forsyth County in 1936, 1937, and 1938, or Davidson County in 1936, 1937, 1938, and 1939. Since these counties have not been served continuously, they will be excluded from further consideration. We conclude that applicants have been in bona fide operation prior to June 1, 1935, and continuously since, from and to points in Guilford, Randolph, Chatham, and Alamance Counties, N. C., and that these four counties constitute the base area served by applicants in the transportation of general commodities.

Since the statutory date applicants have served other counties in North Carolina outside of the Greensboro area

but only one county, Mecklenburg County, has been served continuously. Charlotte, the only point served in this county, was served with the following shipments: 1 in 1936, 8 in 1937, 22 in 1938, 25 in 1939, 14 in 1940, and approximately 300 in 1941. Of the 70 shipments transported from 1936 to 1940, 36 consisted of empty machinery cases and 34 of other commodities. This segregation as to commodities shows that the transportation of general commodities was unsubstantial and sporadic during the subsequent period and that this transportation did not become substantial until 1941. The latter service must be treated as a new operation rather than a continuance of the sporadic operation previously conducted from and to Charlotte.

In considering points served in the outlying territory, we do not require as strict a showing of substantiality and continuity as we do in respect of the base territory. This is due to the nature of a radial operation since the shipments tend to be concentrated in the base territory and to be diffused in the outlying territory. The showing required cannot be measured by any exact standard but as a general rule the degree of substantiality and continuity required to be shown depends on what would reasonably be expected of an operator endeavoring to give a good-faith service from and to particular points and areas, having in mind the size, location, accessibility and traffic potentialities of such points and areas, the characteristics of the traffic and the ability of the applicant to perform such a service.

In Pennsylvania, applicants have served Philadelphia substantially and continuously since prior to the statutory date and are entitled to "grandfather" rights to serve this point. York was served several times prior to June 1, 1935, once in 1937, one in 1938, and several times in 1941. The transportation of only two shipments during

the 5-year period from 1936 to 1940 is insufficient to warrant the grant of "grandfather" rights to serve York. Marcus Hook, Scranton, and Sunbury, Pa., were served once apiece prior to the statutory date but not thereafter and hence, must be excluded. Reading has been served continuously since prior to June 1, 1935, but all shipments, except one prior to that date and three in 1938, have consisted of empty machinery cases. The transportation of one shipment of general commodities prior to the statutory date and three shipments thereafter is insufficient to establish a general-commodity service from and to Reading. Subsequent to the statutory date, 12 other points in Pennsylvania were served once or twice on rare occasions, but this service was obviously sporadic and need not be considered.

In Maryland, Baltimore is the only point that has been served regularly prior and subsequent to June 1, 1935, in the transportation of general commodities. Camp Meade, Annapolis, and Hagerstown, Md., were served prior to that date but not thereafter. Cambridge, Md., was served once in 1938 and Cardiff, once in 1941.

In Ohio, substantial service was rendered prior to the statutory date from and to Akron, Zanesville, Columbus, Cincinnati, and Toledo. These points are located in all sections of the State thereby indicating an undertaking to conduct State-wide operations in Ohio. Subsequent to the statutory date, service was continued from and to the foregoing points and was also extended to other Ohio points such as Wadsworth, Coshocton, Cleveland, Dover, Wapakoneta, and Dayton, thereby confirming that undertaking. In view of the wide distribution of the points served during the prior and subsequent periods, we are of the opinion that applicants are entitled to State-wide authority in Ohio.

Pursuant to the foregoing analysis, applicants will be granted "grandfather" rights for the transportation of general commodities, with certain exceptions, between points in Guilford, Randolph, Chatham, and Alamance Counties, N. C., on the one hand, and Philadelphia, Baltimore, and all points in Ohio, on the other. These outlying points would normally be served over routes traversing West Virginia, Virginia, Delaware, and the District of Columbia, and appropriate authority to use such routes will be granted by our findings herein.

Although the operations conducted prior to June 1, 1935, may have been more extensive than those authorized herein, applicants cannot be granted "grandfather" rights to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion, we have been guided by the principles announced by the Supreme Court in **United States v. Carolina Freight Carriers Corp.**, 315 U. S. 475.

Findings.—Upon further hearing, we find that applicants' operation is that of a common carrier; that applicants were on June 1, 1935, and continuously since have been in bona fide operation as a common carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of (1) commodities requiring special equipment and handling by reason of size or weight, and machinery, between points in North Carolina, on the one hand, and, on the other, points in Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Massachusetts, and Rhode Island, traversing Connecticut, Delaware, and the District of Columbia for operating convenience, (2) household goods as defined in **Practices of Motor Common Carriers of Household Goods**, 17 M. C. C. 467, between points in North

Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and the District of Columbia, (3) empty machinery cases (wooden boxes), from all points in North Carolina to Reading, Pa., (4) general commodities, except articles of unusual value, dangerous explosives, commodities in bulk, commodities requiring special equipment and handling by reason of size or weight, machinery, and household goods as defined in **Practices of Motor Common Carriers of Household Goods**, 17 M. C. C. 467, between points in Guilford, Randolph, Chatham, and Alamance Counties, N. C., on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md., and all points in Ohio, traversing West Virginia, Virginia, Delaware, and the District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction; that applicants are entitled to a certificate authorizing the continuance of such operations; and that in all other respects the application should be denied.

Upon compliance by applicants with the requirements of sections 215 and 217 of the Interstate Commerce Act and with our rules and regulations thereunder, an appropriate certificate will be issued. An order will be entered denying the application except to the extent granted herein.

Appendix.

Radial Shipments of General Commodities

Between North Carolina and States listed below:

	1-1-33 to 6-1-35	1936	1937	1938	1939	1940	1941
Seaboard States							
Virginia	44	4	7	6	6	12	17
District of Columbia	22	..	2	4	2	..	..
Maryland	116	24	37	34	31	12	11
Delaware	6	..	5	6	1	3	..
Pennsylvania	249	94	102	261	178	74	78
New Jersey	9	5	3	21	5	11	8
New York	39	2	6	4	6	2	9
Connecticut	5	..	..	..	..	..	..
Rhode Island	1	2	1	..	1	..	..
Massachusetts	41	9	11	..	2	..	..
Interior States							
West Virginia	6	..	..	..	..	..	3
Ohio	104	7	11	35	55	186	153
Indiana	30	2	8	4	4	6	82
Illinois	48	..	3	1	..	58	1770
Michigan	6	..	..	..	..	..	..
Southern States							
South Carolina	8	2	3	..	3	22	7
Georgia	3	2	2	3	7	17	11
Tennessee	..	2	..	14	10	4	1
Alabama	..	1	..	..	..	10	10
Total	737	156	201	393	311	417	2160

In the District Court of the United States for the Middle District of North Carolina.
Greensboro Division.

Civil No. 219 G.

Guy M. Turner and Frank B. Turner, doing business as Turner's Transfer, Plaintiffs,

Versus

United States and Inter-State Commerce Commission, Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

The Court makes the following findings of fact:

1. The Inter-State Commerce Commission on December 30, 1943 filed its report and order in No. M. C. 66691 in which it granted to the applicant a certificate of Public Convenience and Necessity for the operation of a common carrier by motor vehicle on irregular routes of:

> "(1) commodities requiring special equipment and handling by reason of size or weight, and machinery, between points in North Carolina, on the one hand, and, on the other, points in Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Massachusetts, and Rhode Island, traversing Connecticut, Delaware, and the District of Columbia for operating convenience, (2) household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M. C. C. 467, between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Mary-

land, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and the District of Columbia, (3) empty machinery cases (wooden boxes), from all points in North Carolina to Reading, Pa., (4) general commodities, except articles of unusual value, dangerous explosives, commodities in bulk, commodities requiring special equipment and handling by reason of size or weight, machinery, and household goods as defined in Practices of Motor Common Carriers of Household Goods, 17 M. C. C. 467, between points in Guilford, Randolph, Chatham, and Alamance Counties, N. C., on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md., and all points in Ohio, traversing West Virginia, Virginia, Delaware, and the District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction; that applicants are entitled to a certificate authorizing the continuance of such operations; and that in all other respects the application should be denied."

2. The Commission found from the evidence that the application for larger rights should be denied for the reason that upon the evidence the Commission found either, that there had been no substantial service prior to June 1, 1935 upon which a certificate could be issued or, that the service had not continued within the meaning of the Act since June 1, 1935.

3. Upon a careful review of the evidence we adopt the findings of the Commission.

CONCLUSIONS OF LAW.

And the Court sets forth the following as its conclusions of law:

1. The findings and order of the Commission are based on substantial evidence, do not involve any error of law and are not arbitrary or unreasonable.

2. The Commission was acting within the discretion vested in it by Congress in denying certificate for the larger rights requested by the applicant.

3. Injunction should be denied and the suit dismissed.

OPINION OF THE COURT.

Before Parker, Circuit Judge, and Webb and Hayes, District Judges.

Hayes, District Judge:

This is a suit under 28 USCA 43-48 to set aside and enjoin an order of the Interstate Commerce Commission granting to the applicant a certificate of necessity for less territory and restrictions as to commodities less than that for which he applied. The findings in the report of the Commission were made by Division 5 of the Commission on December 30, 1943, No. M. C. 66691. The Commission had made a prior report, 27 M. C. C. 131.

For convenience the territory applied for and refused and the commodities applied for and refused will be enclosed in parenthesis. The application under the "grandfather clause" sought a certificate of public convenience as common carrier over irregular routes of, (1) general commodities (a) between points in North Carolina, South Carolina, and Virginia and (b) between points in those three states, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New York, New Jersey, Connecticut, Rhode Island, and Massachusetts; [The Commission granted the petition to the extent of territory of points in Guilford, Randolph, Chatham and Alamance Counties, North Carolina, on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md. and all points in Ohio traversing West Virginia and District of Columbia for operating

convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction]; (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, Sou'h Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvana, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, construction materials and other heavy or bulky commodities requiring the use of special equipment between points in (Alabama), (Georgia), (South Carolina), North Carolina, (Tennessee), (Virginia), (West Virginia), (Ohio), (Indiana), (Michigan), (Illinois), (District of Columbia), (Maryland), (Delaware), (Pennsylvania), (New Jersey), (New York), (Connecticut), (Rhode Island), and (Massachusetts). The Commission allowed the application between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and District of Columbia, and empty machinery cases (wooden boxes) from all points in North Carolina to Reading, Pa.

With respect to general commodities the Commission analyzed the evidence thoroughly and said:

> "In our opinion the Greensboro area is the only area which was served substantially prior to the statutory date with a sufficient variety of commodities to establish a general commodity service . . . we conclude that applicants have been in bona fide operation prior to June 1, 1935 and continuously since, from and to points in Guilford, Randolph, Chatham and Alamance counties in North Carolina and that these four counties constitute the base area served by applicants in the transportation of general commodities."

The Commission further stated,

> "Although the operations conducted prior to June 1, 1935 may have been more extensive than those authorized herein, applicant cannot be granted 'grandfather rights' to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion we have been guided by the principles announced by the Supreme Court in U. S. v. Carolina Freight Carriers Corporation, 315 U. S. 475."

At the second hearing the Commission considered all of the evidence that had been produced including the evidence that was produced at the first hearing. Its findings of fact are in line with what has been stated above and to avoid undue length they will not be restated here.

The complainant contends that the findings of the Commission necessitate a reversal because of an erroneous application of the law to the facts found; that irregular routes necessarily negative continuity; that substantial and continuous service from June 1, 1935 to the filing of the petition do not apply to carriers over irregular routes; that the Commission's ruling would require a carrier to go regardless of whether he had freight to haul and relies on Thomson v. United States, 321 U. S. 19, to sustain his contention. The facts in that case were not disputed. The Supreme Court said:

> "The railroad alone is entitled to common carrier 'grandfather' rights as to the motor vehicle service forming an integral part of its unified freight service. Any other conclusion would authorize the wholesale granting of twenty-three 'grandfather' permits to the various motor vehicle operators on the basis of this single transportation service offered by the railroad—a result which ascribes to Congress an intent incompatible with its purpose of regulation."

The substantiality and continuity of service was not in dispute. The Commission had held that the railroad was not entitled to the certificate because it had procured the service to be rendered by twenty-three independent truck contractors. We are unable to find anything in that case which sustains the complainant here. Nor does U. S. v. Carolina Carriers Corporation, 315 U. S. 475 (38 Fed. Supplement 549), help complainant. The Commission applied the law of that case in its disposition of the application here. That case involved a carrier over irregular routes. As to the power of the Commission to limit the territorial scope of operations, the Court there said:

> "While service to and from all points in the states included in the application was not allowed, the reduction was determined by the standard of substantiality of service, and consideration was given to the characteristics of irregular route carriers and their role in the national transportation system. That involved a weighing of specific evidence in light of the complexities of this transportation service. The judgment required is highly expert. Only where the error is patent may we say that the Commission transgressed."

Measured by this standard, the instant case as to the scope of territory is peculiarly one for the Commission. We find no error in this regard.

In Bush Transfer, Inc., v. United States, 53 Fed. Supp. 640, this court had occasion to consider the construction of the statute with respect to carriers over irregular routes as to territorial scope and restrictions on commodities and Senior Circuit Judge Parker said:

> "With respect to the limitation of commodities authorized to be carried in northbound transportation, we think that this, as well as points to be served, was a matter to be determined by the Commission in

application of the standard of substantiality of service within the critical period. The record discloses that, notwithstanding a somewhat broader holding out, the northbound service of plaintiff during the critical period had been confined to the transportation of new furniture, and we think that the Commission was acting in the proper exercise of its power in limiting authority under the certificate accordingly. As said by the Supreme Court in United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 483, 62 S. Ct. 722, 727, 86 L. Ed. 971: 'It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say he may be a common carrier only of a restricted number of commodities.' "

The evidence in the record affords a reasonable basis to sustain the findings of the Commission both as to territorial scope and commodities to be carried. Congress conferred upon the Commission the power to form its judgment and to enter appropriate orders. There is no error justifying this court to set the order aside.

From what has been said it is not necessary to devote more comment to the contention that the Commission erred by requiring continuity of service after June 1, 1935. It is urged here that the statute does not require continuity subsequent to June 1. The Act (49 U. S. C. 306) directs the Commission to issue a certificate of necessity to a carrier who "was in bona fide operation as a common carrier by motor vehicle on June 1, 1935 and has so operted since that time . . . except . . . interruption of service over which applicant had no control." Bona fide operation as a common carrier means substantial as distinguished from occasional or sporadic service. U. S. v. Carolina Freight Carriers Corp., supra. The phrase "and has so operated since that time" means continued bona fide operation as a common carrier. If substantial service

prior to June 1 is essential to the granting of the certificate, it follows that the carrier must continue in that bona fide operation if he secures a certificate. To hold otherwise would delete from the Act the words "and has so operated since that time." This the court will not do. It is therefore the duty of the Commission to consider the evidence and to determine from it whether there was bona fide operation as a common carrier before June 1, 1935; if so, whether that bona fide operation continued since that time. These are questions of fact for the determination of the Commission from the evidence produced. The weight of that evidence is for the Commission not the courts. The evidence here is substantial, supports the findings and no error of law is discovered to vitiate the findings.

For the reasons stated the injunction will be denied and the suit dismissed.

Injunction denied and suit dismissed.

John J. Parker,
United States Circuit Judge, Fourth Circuit.

E. Y. Webb,
United States District Judge, Western District of North Carolina.

Johnson J. Hayes,
United States District Judge, Middle District of North Carolina.

In the District Court of the United States for the Middle District of North Carolina at Greensboro

Civil No. 219 G

GUY M. TURNER AND FRANK B. TURNER, DOING BUSINESS AS TURNER'S TRANSFER, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] entered August 1, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellants' complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated December 30, 1943, granted to appellants a certificate as a common carrier by motor vehicle over irregular routes un-

[1] The Court also made findings of fact and conclusions of law and rendered an opinion.

der the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act (49 U. S. C. 306a), but denied authority to serve other territory included in the application.[2] An appeal was allowed on August 21, 1944, and a stay pending appeal was granted, conditioned upon

[2] The Commission granted authority to transport:

(1) commodities requiring special equipment and handling by reason of size or weight, and machinery, between points in North Carolina, on the one hand, and, on the other, points in Georgia, South Carolina, Tennessee, Virginia, Maryland, Pennsylvania, New Jersey, New York, Massachusetts, and Rhode Island, traversing Connecticut, Delaware, and the District of Columbia for operating convenience, (2) household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Michigan, Indiana, Illinois, Pennsylvania, Delaware, Maryland, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, and the District of Columbia, (3) empty machinery cases (wooden boxes), from all points in North Carolina to Reading, Pa., (4) general commodities, except articles of unusual value, dangerous explosives, commodities in bulk, commodities requiring special equipment and handling by reason of size or weight, machinery, and household goods as defined in *Practices of Motor Common Carriers of Household Goods*, 17 M. C. C. 467, between points in Guilford, Randolph, Chatham, and Almance Counties, N. C., on the one hand, and, on the other, Philadelphia, Pa., Baltimore, Md., and all points in Ohio, traversing West Virginia, Virginia, Delaware, and the District of Columbia for operating convenience, and (5) empty containers, skids, and rejected or damaged shipments from and to the foregoing points in either direction.

Appellants applied for authority to transport:

(1) general commodities, except loose bulky commodities, currency, bullion, dangerous explosives, and articles of virtu, (a) between points in North Carolina, South Carolina, and

the prompt docketing of the case. Appellants have never made any formal service upon appellees of a complete set of the appeal papers as required by Rule 12, paragraph 2 of the Rules of the Supreme Court. However, defendants on August 11, 1944, prior to the allowance of the appeal, received certain of the required appeal papers in a letter from the clerk of the court. The order allowing appeal was received by defendants in a similar letter on August 23, 1944.

The basis for the Commission's action in thus restricting appellants' rights is indicated by the following statement from its opinion:

> Although the operations conducted prior to June 1, 1935, may have been more extensive than those authorized herein, applicant cannot be granted "grandfather

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irginia, and (b) between points in those three States, on the one hand, and, on the other, points in Georgia, Alabama, Tennessee, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, (2) of household goods between points in North Carolina, on the one hand, and, on the other, points in Alabama, Georgia, South Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Illinois, Michigan, Pennsylvania, Maryland, District of Columbia, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts, and (3) of machinery, construction materials, and other heavy or bulky commodities requiring the use of special equipment between points in Alabama, Georgia, South Carolina, North Carolina, Tennessee, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, District of Columbia, Maryland, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts.

> rights" to serve points and areas which, according to the complete evidence of operations since the statutory date, have not been served substantially and continuously since that time. In reaching this conclusion we have been guided by the principles announced by the Supreme Court in *U. S.* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475.

Appellants contended before the District Court that the Commission, in restricting their rights, erroneously applied the law to the facts found, and particularly erred in requiring an irregular route carrier to establish continuity of service after January 1, 1935. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

The Commission, as clearly appears from its quoted statement above, applied a test of substantiality of service in determining the geographical scope of appellants' operations during the "grandfather" period. As the Commission indicates, such action was clearly responsive to the holding of this Court in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–481. There the Court, in sustaining geographical limitations imposed by the Commission under the "grandfather clause" upon an irregular route carrier, said:

> The precise delineation of the area or the specification of localities which may be

> serviced has been entrusted by the Congress to the Commission * * *. The Act provides the test of "bona fide operation." That standard carries the connotation of substantiality. It also makes clear that a holding out to serve a specified area is not alone sufficient. It is "actual rather than potential or simulated service" which is required. *McDonald* v. *Thompson*, 305 U. S. 263, 266. *Substantial, as distinguished from incidental, sporadic, or infrequent, service is required.* Substantial service actually rendered may have been confined to narrow limits. *Loving* v. *United States*, 32 F. Supp. 464, aff'd 310 U. S. 609. Ability to render the service throughout the wide reaches of the territory, which the applicant professed to be willing to serve, may not have existed * * * *While service to and from all points in the States included in the application was not allowed, the reduction was determined by the standard of substantiality of service.* [Italics supplied.]

The Commission having thus applied the correct legal test, its findings of fact as to the substantiality of past service in different areas must be sustained, unless patently in error or not supported by substantial evidence. *Alton R. Co.* v. *United States*, 315 U. S. 15, 23; *United States* v. *Carolina Carrier Corp., supra*, 482–483. Here the Commission had before it an unusually complete record including exhibits showing all ship-

ments transported by appellants from April 1936 to December 1941, and its particularly painstaking report analyzes the evidence in detail. The District Court's conclusion that the Commission's findings were supported by substantial evidence is clearly correct and should be sustained.

Appellants' contention that because they engaged in only irregular route or territorial operations, rather than regular route operations, they were not required under the "grandfather clause" to establish continuity of service after June 1, 1935, is equally without merit. This is obvious from the statutory language. Section 206 (a) of the Interstate Commerce Act (49 U. S. C. 306 (a))[3] requires an applicant to establish not only bona fide operation on June 1, 1935, but also that he "has so operated since that time." And this is true not only of operations "over the route," but also, "within the territory for which application is made."[4] As pointed out in the opinion of the

[3] This section provides:

"If any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, * * * the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation."

[4] While the Commission may take into consideration the irregular route nature of the operations in determining whether in a particular case service is substantial and continuous (see *United States* v. *Carolina Carriers Corp.*, *supra*, 481), that is not to say that a different legal test is to be applied for those carriers than for regular route carriers.

District Court, to disregard the requirement of continued operation following June 1, 1935, would be to delete from the Act the words, "and has so operated since that time." Furthermore, this Court held two years ago in *Gregg Cartage & Storage Co.* v. *United States,* 316 U. S. 74, 78, that applicants under the "grandfather clause" must establish continuity of operations beyond the "grandfather" date, June 1, 1935, and this was not a novel holding even then. The Court there said:

> Appellants contend that the Commission and the court below erroneously construed § 206 (a) of the Motor Carrier Act in holding that, excepting the specified interruptions of service, the statute required continuous operation from June 1, 1935, until the hearing by the Commission on the application. *We have, however, held to the contrary. United States* v. *Maher,* 307 U. S. 148, petition for limited rehearing denied, 307 U. S. 649. *Hoey* v. *United States,* 308 U. S. 510; *Lubetich* v. *United States,* 315 U. S. 57. [Italics supplied.]

For the foregoing reasons it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

Certificate of Service

I hereby certify that I served a copy of the attached motion to affirm upon each of the following named counsel for appellants this 14th day of September 1944:

Edgar Watkins, Esquire,
Citizens and Southern National Bank, Bldg.,
Atlanta, Georgia.
William M. York, Esquire,
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Robert L. Pierce,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE, 1944

No. 473. TURNER ET AL. *v.* UNITED STATES ET AL. Appeal from the District Court of the United States for the Middle District of North Carolina. November 13, 1944. *Per Curiam:* The motion to affirm is granted and the

judgment is affirmed. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 480–81. *Mr. Edgar Watkins* for appellants. *Solicitor General Fahy* and *Mr. Daniel W. Knowlton* for appellees. Reported below: 56 F. Supp. 798.